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No. 15-415

In The
Supreme Court of the United States

ENCINO MOTORCARS, LLC,

Petitioner,

v.

HECTOR NAVARRO, MIKE SHIRINIAN, ANTHONY PINKINS, KEVIN MALONE, AND REUBEN CASTRO,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND NATIONAL EMPLOYMENT LAW PROJECT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The National Employment Lawyers Association ("NELA") is the largest professional membership organization in the country comprising lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

The National Employment Law Project ("NELP") is a non-profit legal organization with over 45 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP's areas of expertise include the workplace rights of low-wage workers

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[1] Pursuant to this Court's Rule 37.3(a), both parties submitted letters to the Clerk granting blanket consent to *amicus curiae* briefs. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amici, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

under federal employment and labor laws, with a special emphasis on wage and hour rights. Employment rights are virtually meaningless if workers cannot join together in a collective or class action to seek protections, and upholding the procedural rights for workers under these mechanisms is therefore paramount to ensuring those protections. NELP has litigated and participated as *amicus* in numerous cases addressing the rights of workers under the Fair Labor Standards Act (FLSA) and related state laws in most federal circuits and in the United States Supreme Court.

Amici have an abiding interest in the protection of the legal rights of working men and women. Service advisors employed at automobile dealerships do not fall within the Section 213(b)(10)(A) exemption of the FLSA. Accordingly, those advisors are entitled to the protections of the FLSA. *Amici* submit this brief to explain why the decision of the Ninth Circuit Court of Appeals should be affirmed.

SUMMARY OF THE ARGUMENT

Fair Labor Standards Act (FLSA) § 213(b)(10)(A), by its terms, exempts salesmen engaged in the business of selling "automobiles, trucks, or farm implements." The Petitioner concedes that the service advisors who are the Plaintiffs-Respondents in this case do not sell

"automobiles, trucks, or farm implements." The exemption's language is not ambiguous, and plainly does not apply to service advisors. This construction of the statute is supported by the interpretive rules of *expressio unius est exclusio alterius* and *reddendo singula singulis*, and on those grounds alone, the Court can affirm the judgment of the court of appeals. Further, though its application is not necessary to affirm the judgment of the court of appeals, this Court's well-settled, consistently-applied rule of construing exemptions to the FLSA narrowly against the employer, in order to achieve the remedial, humanitarian purposes for which the FLSA was enacted, also supports affirming the judgment of the court of appeals.

ARGUMENT

I. THIS COURT CAN AFFIRM THE COURT OF APPEALS, WITHOUT APPLICATION OF THE FLSA "NARROW CONSTRUCTION" RULE, BY APPLYING OTHER CANONS OF CONSTRUCTION THAT PLAINLY EXCLUDE THE "SERVICE ADVISOR" FROM THE SECTION 213(b)(10)(A) EXEMPTION

Petitioner argues that the unambiguous language of 29 U.S.C. § 213(b)(10)(A) exempts Service Advisors from the overtime requirements of Section 7 Pet.'s Brief at 22–28. While *amici* agree that the language of the exemption is not ambiguous, Petitioner is wrong that the plain

language of the Section 213(b)(10)(A) includes service advisors.

To reach that conclusion, Petitioner engages in some linguistic sleight-of-hand. Petitioner admits that "Service advisors sell services to the dealership's customers." Pet.'s Brief at 23. Petitioner states that service advisors are "dedicated to" the servicing side of the business, and that they are "integral to the process of servicing vehicles." *Id.* Ergo, says Petitioner, service advisors are primarily engaged in servicing vehicles. *Id.* at 23-24.

Assuming Petitioner's predicate statements are true, that service advisors sell services, that they are dedicated to the servicing side of the dealership, and that they are integral to the process of servicing cars: all that given, service advisors are still not servicing vehicles, but only, as Petitioner admits, selling automobile servicing.

Under traditional methods of statutory construction, it is clear that service advisors are not within the ambit of the Section 213(b)(10)(A) exemption.

A. Under The Interpretive Rule Of *Expressio Unius Est Exclusio Alterius*, The Section 213(b)(10)(A) Exemption Is Limited To Three Positions, Salesman, Partsman And Mechanic, And Two Duties, Selling Automobiles Or Servicing Automobiles, But Does Not Include Either "Service Advisor" Or The Duty Of "Selling Servicing"

The rule of statutory construction *expressio unius est exclusio alterius* provides that the express

mention of one thing of a type may excludes others of that type. *United States v. Vonn*, 535 U.S. 55, 64 (2002).

This Court has cautioned, however, that the expression-exclusion rule will not apply where indications are that passage of statutory language was likely not meant to signal exclusion of others of the type. *Id.* Equally damning to the rule is if the enumerated series is characterized as illustrative, rather than exclusive. *Chevron U.S.A. v. Echazabal*, 536 U.S. 73, 80 (2002). As well, the canon fails if the enumerated series does not suggest, by a telling absence, the inference that the thing omitted was intentionally left out. *Id.* at 81.

> As we have held repeatedly, the canon expressio unius est exclusio alterius does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an "associated group or series," justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.

Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003).

Section 213(b)(10)(A) identifies three positions within a car dealership: salesman, partsman, or mechanic. The Section identifies two functions or duties: selling or servicing automobiles. Both groups are "associated group[s] or series," such that the absence of another in the series, such as "service advisor," or "selling servicing," suggests that the omission was an intentional decision on the part of Congress.

Further, we know that that decision was intentional because of the record of legislative changes to the exemption that occurred in the 1960s.

As the court of appeals noted, in 1961 Congress made exempt *all* employees of car dealerships. *Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267, 1276 (9th Cir. 2015). In the next few years, several bills regarding dealership employees were considered, including one that would have exempted only salesmen and mechanics. *Id.* Those failed. After a number of false starts in 1966, including three "final" versions, the present[2] incarnation of the exemption was passed.

Thus, from 1961 to 1966, all dealership employees, including service advisors, were exempt from the FLSA requirements. In those intervening years, numerous different bills were considered by Congress regarding dealership employees, until the passage of the final bill, which included as exempt *only* salesman, partsman, and mechanic, and only if "primarily engaged in selling or servicing automobiles "

The positions and duties identified in the Section 213(b)(10)(A) exemption were the result of much back and forth in Congress, which suggests that Congress was making definitive choices regarding the exempt status of various types of dealership employees; just the opposite of an indication that exclusions were not intentionally made. Furthermore, the positions and functions are exclusive, not illustrative.

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[2] Additional changes were made in 1974 not germane to this case. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 14, Apr. 8, 1974, 88 Stat. 55, 65.

Accordingly, construction of the Section 213(b)(10)(A) exemption under the expression-exclusion rule reveals both that service advisors are not exempt, and that the duty that service advisors perform, namely selling servicing, is not a function subject to exempt status.

B. Under The Construction Canon Of *Reddendo Singula Singulis*, The Two Duties Of The Section 213(b)(10)(A) Exemption Are To Be Applied To Such Of The Three Positions As Are Related By Context and Applicability

Under the canon of *reddendo singular singulis*, a court can interpret a writing with a number of antecedents and a number of consequents by reference to the context and purpose of the writing as a whole. 2A N. Singer & J.D. Singer, Statutes and Statutory Construction § 47.26, at 438 (7th ed. 2007); *Sandberg v. McDonald*, 248 U.S. 185, 204 (1918).

> [The penalty provisions of the Seaman's Act of 1915] may be distributively applied and such application has many examples in legislation. It is justified by the rule of reddendo singula singulis. By it words and provisions are referred to their appropriate objects, resolving confusion and accomplishing the intent of the law against, it may be, a strict grammatical construction.

Sandberg, 248 U.S. at 204. *See also Go-Video, Inc. v. Akai Electric Co.*, 885 F.2d 1406 (1989) (under

reddendo singular singulis maxim, a court interprets statutory passage in which antecedents and consequents are ambiguous by reference to context and to purpose of entire act).

Petitioner claims that it is a fundamental grammatical rule that where a series of nouns face a series of gerunds as objects, each noun will link to each gerund. Pet.'s Brief at 24. That is, "as long as that noun-gerund combination has a sensible meaning." *Id.*

To make the exemption work for Petitioner, in order for service advisors to be exempt, they must be "salesmen servicing automobiles." But that noun-gerund combination does *not* have a sensible meaning. Salesmen do not service cars; nor do partsmen or mechanics sell cars. Those combinations are nonsensical: they are, in the words of the court of appeal, the "meowing dog" and "barking cat" of the automobile dealership. 780 F.3d at 1275.

What does make sense is to read Section 213(b)(10)(A) distributively, such that a giving noun takes the appropriate object: salesmen selling automobiles and partsmen and mechanics servicing automobiles.

II. UNDER THIS COURT'S 70–YEAR–OLD PRECEDENT, FLSA EXEMPTIONS ARE NARROWLY CONSTRUED AGAINST THE EMPLOYER, AND UNDER THAT NARROW CONSTRUCTION, SERVICE ADVISORS DO NOT FALL WITHIN THE SECTION 213(b)(10)(A) EXEMPTION

In holding that service advisors are not exempt from overtime, Petitioner claims that the court of

appeals "relied heavily," Pet.'s Brief at 15, on the narrowly-construed canon. To the contrary, the court of appeals does not appear to have relied on it at all.

The court of appeals wrote:

> Examining the statutory text and applying canons of statutory interpretation, we cannot conclude that service advisors such as Plaintiffs are "persons plainly and unmistakably within [the FLSA's] terms and spirit."

Navarro, 780 F.3d at 1271 72 *citing Solis v. Washington,* 656 F.3d 1079, 1083 (9th Cir. 2011) (internal quotation marks omitted). After considering plausible meanings of the word "salesman," the court stated:

> It is not clear from the text of the statute whether Congress intended broadly to exempt any salesman who is involved in the servicing of cars or, more narrowly, only those salesmen who are selling the cars themselves Nor do canons of statutory interpretation aid Defendant. To the contrary, the § 213 "exemptions are narrowly construed against employers." *Haro,* 745 F.3d at 1256 In sum, the statutory text and canons of statutory interpretation yield no clear answer to whether Congress intended to include service advisors within the exemption. Because Congress has not "directly spoken to

> the precise question at issue," *Chevron*, 467 U.S. at 842, the statute is ambiguous.

Id. at 1272. This is not an application of the narrowly-construed canon. If it were, once the court determined that service advisors are *not* "plainly and unmistakably" within the exemption, and since "exemptions are narrowly construed against the employer," then the court should have found service advisors non-exempt, without recourse to U.S Department of Labor (DOL) regulations.

Thus, the canons of statutory interpretation *did* yield a clear answer, because if the interpretive tool of narrowly construing a FLSA exemption against the employer means anything at all, it means not *enlarging* the exemption in any way.

Petitioner claims that service advisors are "unambiguously exempt" from overtime because "service advisors are salesmen primarily engaged in servicing automobiles." Pet.'s Brief at 22.

Whatever else might be said about that statement, there is no question that Petitioner's interpretation calls for an enlargement of the term "servicing automobiles," since Petitioner admits that service advisors do not service cars like mechanics service cars; that is, service advisors do no actual work on the cars. Likewise, Petitioner claims that service advisors are *salesmen*–salesmen that service cars.

A plain English reading of Section 213(b)(10)(A) could not accept such a construction. In fact, service advisors do not service cars; they *sell servicing* to customers. Service advisors sell the services of the mechanic and the partsman to the customer. In any

case, the service advisor is not "servicing" customer cars.

A. The FLSA Is A Remedial Statute Enacted To Eliminate Substandard Wages

After decades of academic research in the early 20th Century,[3] Congress concluded in 1938 that labor conditions detrimental to the minimum necessary standard for the health and well-being of workers were pervasive. 29 U.S.C. § 202(a). To eliminate those conditions, Congress passed the Fair Labor Standards Act. 29 U.S.C. § 202(b).

> The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the

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[3] *See* William G. Whittaker, Congressional Research Service Report for Congress, *The Fair Labor Standards Act: Minimum Wage in the 108th Congress* (2005), Summary.

> orderly and fair marketing of goods in commerce.

29 U.S.C. § 202(a); *Citicorp Industrial Credit, Inc., v. Brock*, 483 U.S. 27, 36 n.8 (1987). This "minimum standard of living" at the heart of congressional concern was emphasized by the Supreme Court six years after the passage of the Act:

> [T]hese provisions, like the other portions of the Fair Labor Standards Act, are *remedial* and *humanitarian* in purpose. We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others.

Tennessee Coal Co. v. Muscoda Local, 321 U.S. 590, 597 (1944) (emphasis added).[4]

Moreover, improving the plight of workers was not Congress' only concern. 29 U.S.C. § 202(a); *Citicorp Indust.*, 483 U.S. at 36–37. Congress also recognized that goods produced under substandard labor conditions result in unfair competition, and drive down wages and working conditions. *Id.*, at 36 n.8. Aside from their effect, such practices are themselves pernicious and "injurious to the commerce." *United States v. Darby*, 312 U.S. 100, 115 (1941).

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[4] Since 1944, numerous courts have referenced the remedial and humanitarian nature of the Act. *See e.g., A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945); *Goldberg v. Wade Lahar Const. Co.*, 290 F.2d 408, 415 (8th Cir. 1961).

Petitioner's *amici* claim that the broad-construction maxim of remedial statutes is flawed because it is based, so they say, on the notion that "Congress intends statutes to extend as far as possible in service of a single objective." Pet.'s Brief at 7

That is a non-sequitur, because construing an exemption narrowly, or requiring that an employer's invocation of an exemption be "plainly and unmistakably" within the exemption's terms, are not conditions that extend the statute "as far as possible." Petitioner's proffered construction of Section 213(b)(10)(A) is a case in point.

Petitioner acknowledges that service advisors sell services. Pet.'s Brief at 23. By some questionable footwork, Petitioner arrives at the conclusion that service advisors are somehow also "servicing automobiles." *Id.* But selling servicing is not the same as servicing, and "selling servicing" is not a job function that places an employee within the ambit of the exemption. *Amici* have argued that other tools of statutory construction yield the conclusion that service advisors are not covered by the exemption. Certainly a narrow construction of Section 213(b)(10)(A) gets to that result, but that is not an "all costs" result, or a position that "extends as far as possible."

B. Section 213 Exemptions Repeatedly And Consistently Have Been Construed Narrowly Against The Employer

This Court's earliest cases holding that the FLSA must be "broadly" or "liberally" interpreted,

and the corollary, that exemptions to the Act be narrowly construed, were prefigured by Justice Frankfurter in *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944).

In *Addison*, citrus fruit cannery employees obtained a judgment on an FLSA claim for unpaid wages. The court of appeals overturned the district court, and the case turned on the definition of "area of production," as that term was used in the Section 13 agricultural exemption of that time. *Id.* at 608–09. The Court reversed the court of appeals and remanded to the district court. Justice Frankfurter wrote:

> The *details with which the exemptions in this Act have been made preclude their enlargement by implication.* While the judicial function in construing legislation is not a mechanical process from which judgment is excluded, it is nevertheless very different from the legislative function. Construction is not legislation and must avoid "that *retrospective expansion of meaning* which properly deserves the stigma of judicial legislation." *Kirschbaum Co.* v. *Walling*, 316 U.S. 517, 522. To blur the distinctive functions of the legislative and judicial processes is not conducive to responsible legislation.

Id. at 618 (emphasis added).

There followed a series of decisions by this Court that made the point more bluntly. *A.H. Phillips*, 324 U.S. at 493 (because the FLSA is a humanitarian and remedial law, any exemption

narrowly construed; any attempt to "extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretive process"); *Powell* v. *U.S. Cartridge Co.*, 339 U.S. 497, 517 (1950) (Act exemptions were "narrow and specific."); *Mitchell v. Kentucky Fin. Co.*, 359 U.S. 290, 295–96 (1959) ("well settled that exemptions from the Fair Labor Standards Act are to be narrowly construed."); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 394 (1960) (Section 213 exemptions "narrowly construed" against employer); *Moreau v. Klevenhagen*, 508 U.S. 22, 33 (1993) ("well-established rule" that exemptions from the Act are narrowly construed).

Most recently, the Court has raised the "narrowly construed" rule twice. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2172 n. 21 (2012) (Court has stated that FLSA exemptions must be narrowly construed against employer and their application limited to those instances "plainly and unmistakably within their terms and spirit"); *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 879 n.7 (2014) (exemptions to the Act are construed narrowly against employer asserting them). In both instances the Court provided the same rationale as to why the rule was not applicable: the "narrowly construed" rule applies to exemptions, and the issues in *Christopher* and *Sandifer* went beyond Section 213. 132 S. Ct. at 2172 n. 21; 134 S. Ct. at 879 n.7

Petitioner's *amici* suggest that this Court has abandoned the narrowly-construed rule, and indeed claim that, after 70 years, that canon of construction was really nothing more than dicta. Chamber of Commerce Brief at 17

But from the earliest days of the Act, and the earliest decisions of this Court on the Act, the narrowly-construed rule has only operated as to exemptions under Section 213. So the rationale provided by this Court for not applying the rule in *Christopher* and *Sandifer* is wholly consistent with the rule's treatment in *A.H. Phillips*, *Mitchell* and *Arnold*.

As to the statement of Petitioner's *amici* that the narrowly-construed canon is dicta, Chamber of Commerce Brief at 17, that is not the characterization that this Court has employed. "*We have held* [Section 213] exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." *Arnold*, 361 U.S. at 394 (emphasis added).[5]

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[5] Nor do the Courts of Appeals treat the FLSA narrowly-construed rule as dicta. *See, e.g., Marzuq v. Cadete Enters.*, 807 F.3d 431, 438 (1st Cir. 2015) (citing cases) (remedial nature of FLSA requires that its exemptions be narrowly construed against those seeking to invoke them); *Chen v. Major League Baseball*, 6 F. Supp. 3d 449, 454 (2d Cir. 2014) (exemptions must be narrowly construed and limited to such establishments "plainly and unmistakably" within exemptions' terms); *Pignataro v. Port Auth.*, 593 F.3d 265, 268 (3d Cir. 2010) (FLSA exemptions narrowly construct against employer); *Calderon v. GEICO Gen. Ins. Co.*, 809 F.3d 111, 120-21 (4th Cir. 2015) (as remedial act, FLSA exemptions must be narrowly construed against employer, and employer must prove applicability of exemption by clear and convincing evidence); *McGavock v. City of Water Valley*, 452 F.3d 423, 424 (2006) (FLSA construed liberally in favor of employees, and exemptions narrowly against employers seeking to assert them); *Lutz v. Huntington Bancshares, Inc.*, No. 14-3727, 2016 U.S. App. LEXIS 3860, at *9 (6th Cir. Mar. 2, 2016) (exemption narrowly construed

C. If Section 213(b)(10)(A) Is Construed Narrowly, A Service Advisor Is Not Within The Ambit Of The Exemption

After examining the language of the exemption and applying the tools of statutory construction, the court of appeals determined that service advisors were *not* persons "plainly and unmistakably" within the terms of the Section 213(b)(10)(A) exemption.

Had the court been applying the narrow-construction rule, its work would have been completed: the employer was not entitled to invoke the exemption because service advisors were not within its terms.

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against employer); *Johnson v. Hix Wrecker Serv.*, 651 F.3d 658, 660 (7th Cir. 2011) (as a remedial act, FLSA exemptions are narrowly construed against employers); *Fezard v. United Cerebral Palsy of Cent. Ark.*, 809 F.3d 1006, 1010 (8th Cir. 2016) (FLSA exemptions narrowly construed to further congressional goal of broad federal employment protection, and employer must prove that exemption applies by demonstrating that employee "fits plainly and unmistakably with the exemption's terms and spirit."); *Haro v. City of Los Angeles*, 745 F.3d 1249, 1256 (9th Cir. 2014) (FLSA liberally construed in favor of employee, exemptions narrowly construed against employers, and an employee will not be exempt except if found plainly and unmistakably within the terms and spirit of the exemption; *Ellis v. J.R.'s Country Stores, Inc.*, 779 F.3d 1184, 1188 (10th Cir. 2015) (citing cases) (FLSA exemptions must be construed narrowly against employer, who must prove that employee is exempt by "clear and affirmative" evidence); *Gregory v. First Title of Am., Inc.*, 555 F.3d 1300, 1307 (11th Cir. 2009) (FLSA exemptions are narrowly construed, and to extend exemption to employee not plainly and unmistakably within its terms is abuse of interpretive process); *Cannon v. District of Columbia*, 717 F.3d 200, 204 (D.C. Cir. 2013) (employee entitled to overtime and minimum wage unless exempt, and exemptions are narrowly construed).

Accordingly, this Court can affirm the court of appeals ruling based solely on principles of statutory construction, and without recourse to DOL regulations.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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